It is true that in Messrs. Moore's catalogue the book "The Enemy in the Blanket" is included in what is called "A List of books published by publishers represented by Donald Moore, in association with Donald Moore" and in itself there is an ambiguity here which might well have been cleared up had the plaintiff taken the trouble to cross-examine Mr. Moore on his affidavit. But in all the circumstances I can find no justification for refusing to accept the statement in Mr. Moore's affidavit that his Company are indeed the local representatives of Messrs. Heinemann but that they have no control or management of any business or work for Messrs. Heinemann and that they purchase books from Messrs. Heinemann. To my mind there is no inconsistency here.

The catalogue says in effect that Messrs. Moore are carrying on the business (in addition to much other business) of selling Messrs. Heinemann's books and that when they sell them payment is to be made to them and not to Messrs. Heinemann. The affidavit says that such books are purchased by Messrs. Moore from Messrs. Heinemann. In other words a proportion of the books sold by Messrs. Moore are books published by Messrs. Heinemann but in which the property has passed to Messrs. Moore. There is nothing here to belie in any way the statement that Messrs. Moore have no control or management of any business or work for Messrs. Heinemann. Indeed it amounts to no more than saying that Messrs. Moore have the control and management of their own business which consists in part in selling books published by Messrs. Heinemann.

There may be some particular arrangement between Messrs. Moore and Messrs. Heinemann of which we know nothing and as to which the plaintiff has been unable to expiscate any information. That, however, is purely a matter of speculation and the case is to be decided on the material before the Court. On that material there were no grounds for refusing to accept the categorical statement in Mr. Moore's affidavit that his Company had no control or management of any business or work for Messrs. Heinemann in the Federation of Malaya. In the circumstances the purported service of the writ on Messrs. Heinemann should have been set aside and I would allow the appeal to that extent.

With regard to Messrs. Moore I can see little substance in their appeal. The writ against them was properly served on them and I can find no authority for saying that because Messrs. Heinemann are out of the jurisdiction and as it would now appear cannot be served the writ as against Messrs. Moore is a nullity. Order 2 rule 4 only requires leave for issue of a writ when it is to be served or notice of it is to be given out of the jurisdiction and as far as Messrs. Moore are concerned the writ was to be and was in fact served within the jurisdiction.

With regard to the question of costs, difficulty arises by reason of the fact that until a comparatively late stage in the proceedings Messrs. Moore and Messrs. Heinemann were jointly represented. In my view the proper order to be made is that each party should pay his own costs in the Court below and that as regards the appeal the plaintiff should pay Messrs. Heinemann's taxed costs and Messrs. Moore should pay half the taxed costs of the plaintiff.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Pillai, Lim, Lee & Hwang; H. L. Wrigglesworth.*

NG KHOON KHOON v. THE IPOH TOWN COUNCIL & ORS.

[O. C. J. (Smith J.) January 6, 1960]
[Ipoh — Originating Motion No. 13 of 1959]

Local Authority — Practice and Procedure — Prohibition — Application for Order — Laches — Whether right to writ may be lost — Town Boards Enactment (Cap. 137) — Bye-Laws (Part VIII).

The applicant who was the owner of a private dwelling house on land adjacent to that on which an inn was being erected applied for an Order of Prohibition to restrain the respondents from hearing or determining any application for a licence in respect of certain premises in the Town of Ipoh under Regulation 11 of Part VIII of the bye-laws under the Town Boards Enactment (Cap. 137) or from exempting the said premises from the requirements of a licence under Regulation 13 thereof. It was argued on behalf of the owner that (1) as prohibition will not be granted unless there is a material question involved, the erection of a place of public entertainment was not a material question; (2) the writ of prohibition is a writ of right and not a writ of course and as such may be lost by laches. The applicant had between February and December 1959 stood idly by and "watching the building go up." This constituted laches.

Held: (1) the erection of a place of public entertainment is a material question for an adjoining owner who had previously been under the impression that all commercial enterprises were forbidden in that area;

(2) on evidence there has been no laches to disentitle the applicant from the remedy he seeks.

Per curiam: "If I have exercised my discretion in this matter improperly, I still consider that this is such a matter of public importance that it is a case in which the Court should exercise its discretion because, if what the applicant alleges to be the law is in fact the law then the Ipoh Town Council is acting in a way which the law does not permit." See *Regina* v. *Brighton Borough Justices, Ex parte Jarvis*.[2]

Cases referred to:—

(1) *Parochial Church Council of St. Magnus etc.* v. *Chancellor of London Diocese* [1923] P. 45.

(2) *Regina* v. *Brighton Borough Justices, Ex parte Jarvis* [1954] 1 W.L.R. 203, 200.

APPLICATION for order of PROHIBITION.

B. K. Das (*N. Sharma* with him) for the applicant.

J. M. M. Lewis for the respondents.

F. Arulanandom for Madam Sim.

Smith J.: This is a motion by the applicant citing the Ipoh Town Council and its Chairman for an order of prohibition in the following terms:

"An order prohibiting the Ipoh Town Council, and any committee thereof and the Chairman of the Ipoh Town Council, and each of them from hearing or determining any application for a licence by any person in respect of the premises on Lots Nos: 37014 and 37015 in the Town of Ipoh under Regulation 11 of Part VIII

of the by-laws under the Town Boards Enactment (Cap. 137) or for exemption of the said premises from the requirements of a licence under Regulation 13 thereof or from granting a licence in respect of the said premises or exempting the said premises from the requirements of a licence under the Regulations aforesaid."

Notice of the proceedings was served upon Madam K. C. Sim, the owner of the land referred to in the requested order of prohibition. She has appeared and has been heard.

The broad facts of the case are not in dispute. In December, 1957, the owner submitted an application together with a layout plan to the Chairman of the Ipoh Town Council for the construction of premises on lots 37014 and 37015 in Tambun Road, Ipoh. The plan was for the construction of a proposed inn, and was described as "a place of nocturnal entertainment common in other larger towns in the Federation". It was intended that it should be a first class hotel (which would automatically include a right to supply meals to non-residents) with a licence for dancing. On the 31st December, 1957, the owner was informed by the Town Council that her proposal had been approved in principle. She subsequently submitted detailed plans of the building which were approved. Building operations began in April, 1959, and are still proceeding. The owner has already spent more than $150,000 on the construction of the building.

In February, 1959, the applicant who is the owner of a private dwelling house on land adjacent to that on which the inn is being erected read in a local newspaper that the Ipoh Town Council had approved building plans on the site for use as a night club to be known as the "Olympic Inn".

On the 5th and again 17th February, 1959, the applicant wrote to the Chairman of the Ipoh Town Council objecting to the approval of building plans for a night club on the said two lots. The applicant's letter was considered by the Town Planning Committee of the Council on the 11th March, 1959. At that meeting the State Planning Officer drew attention to the fact that re-zoning of the area had not been carried out. A decision was however reached that the applicant should be informed that the proposal was approved in December, 1957, and his objection was received too late. On the 30th March, 1959, the Chairman wrote to the Applicant accordingly.

In April building began.

On the 31st July, 1959, the applicant wrote a third letter to the Town Council requesting that the matter should be reconsidered because the matter had never been advertised nor his views as a neighbour sought. The applicant was informed in a letter from the Chairman on the 18th August, 1959, that the complaint or objection contained in his letter of the 5th February had been considered by the Council but it did not consider it was necessary to alter its previous decision to approve building plans for the Olympic Inn and there was nothing further that could be done for him in this matter as he was the only person to object.

The applicant sent a further letter undated to the Town Council which was received by the Council on the 28th August, 1959, stating that he understood that in the plan for the proposed Olympic Inn provision had been made for an open-air dance hall and he asked if there was any possibility of cancelling the licence for it as the noise and music would prove a nuisance. The General Purposes Finance and Tenders Committee of the Council considered this third request on the 18th September, 1959. From the minutes of that meeting, Exhibit R. 9, it does not appear that the merits of the application were in any way considered. The argument adopted appears to have been that since approval in principle had been given for an inn and dance hall, the Committee could not go back on what it had done. On the 28th September a reply was sent stating that his request to cancel the licence of the open-air dance hall had been carefully considered by this Council and it was decided that since approval in principle of the inn as well as the open-air dance hall was given in 1957 the Council was not prepared to concede to his request.

In October, 1959, the applicant went to a firm of solicitors as a result of which they wrote a letter on the 14th October, 1959, drawing attention to the fact that the applicant was extremely disturbed at the approval of the plans, pointing out that the erection of the night club, as it was described, and its operation would affect adversely the value of his property and asking that before the premises be licensed opportunity be given to him to make oral representations as to the terms and conditions upon which the licence should be issued. On the 19th November, before the Council had replied to this letter, the applicant had instructed another firm of solicitors who wrote requesting an interview and, in effect, asking whether action had been taken to re-zone the area under the Town Boards Enactment. On the 2nd December a further letter was written which was a letter before action; and on the 7th December, 1959, these proceedings were commenced.

It has been conceded by the respondents and not disputed by the owner that this Court has jurisdiction to issue a writ of prohibition to the Town Council.

The law relating to prohibition is conveniently summarised in *Halsbury* 3rd Edition, Volume II, at page 113, section 5 — Prohibition. Many of the leading cases therein referred to have been quoted to me *in extenso*.

"An order of prohibition is an order forbidding an inferior court to continue proceedings therein in excess of its jurisdiction" — paragraph 211 page 113. I am satisfied that for the purposes of granting prohibition there are proceedings at present before the Town Council. The owner has been granted approval in principle for

the erection of a first class hotel with facilities for public dancing on her land. There is in effect pending before the Council an application by her for a first class hotel licence and for a licence for dancing. The Chairman has given evidence that provided she builds in accordance with plans which have already been approved the necessary licence will, as a matter of course, be granted to her by the Council. It is to be noted that this was the attitude of the Council itself on the 18th September, 1959.

"Prohibition will not be granted unless there is a material question involved" — paragraph 213, page 115, *Halsbury* 3rd Edition. It has been urged on behalf of the owner that a mountain is being made out of a molehill. I cannot agree with this. I do not consider that the erection of a place of public entertainment is not a material question for an adjoining owner who had previously been under the impression that all commercial enterprises were forbidden in that area. It is apparently proposed to run an hotel with facilities for non-residents to dine and dance, and the very hotel is intended to cater largely for motorists staying overnight. It is not denied by the owner that it is intended to operate the hotel as a "motel". It is quite clear from the layout plan that the Applicant's enjoyment of his property will be affected. The applicant however appears to seek relief only in so far as the premises are to be used as a place of public entertainment and not in respect of its use as a first class hotel. Since he seeks his prohibition in respect of the granting of any licence under Part VIII of the Bye-Laws under the Town Boards Enactment (Cap. 137) and not in respect of any licence issued under the Boarding Houses Enactment (Cap. 87).

A writ of prohibition is a writ of right and not a writ of course. As Sankey J., said in *Parochial Church Council of St. Magnus, etc.* v. *Chancellor of London Diocese*[1] "The right to a writ of prohibition may be lost by laches, and does not lie as of course." It is necessary in this particular case therefore to see whether there have been any laches by the applicant which disentitle him from the remedy which he seeks. It is the case for the respondents and the owner that the applicant has between February, 1959, and December, 1959, stood idly by, in Mr. Lewis' picturesque phrase, "leaning on his fence and watching the building go up". The principle to be applied is set out in paragraph 221, page 119 *(op. cit.)*. If there has been delay by the applicant, "the Court will decline to interpose except perhaps upon an irresistible case and an excuse for the delay."

The proposal first came to the notice of the applicant in February, 1959, in a newspaper report. The applicant acted promptly by writing to the Council on the 5th and again on 17th February (See Exhibit R. 7 folios 5 and 6). He received a reply on the 30th March. In April building operations began. The applicant did nothing until the 31st July when he wrote a second letter to which he received a reply on the 18th August. He wrote a further letter about the 28th August to which he received a reply on the 28th September. About the 14th October he first went to solicitors. They wrote to the Council. The letter was acknowledged on the 6th November but no reply sent. On the 19th November he changed solicitors and his new solicitors wrote to the Council two letters to neither of which was any reply sent. These proceedings were begun in December.

The respondents' and the owner's principal complaint appears to be that these proceedings could have been begun in February. I think one must first consider with whom the applicant was dealing. He was dealing with a Town Council. He was entitled to assume that the Town Council was complying strictly with the law and would accord to him all the opportunities to be heard which the law allowed. The remedies which he sought have varied from time to time. On the 5th February, 1959, he wished to see whether "a more suitable place could be proposed for the putting up of a night club." On the 30th March he was told that his objection had been received too late. There now comes a gap of four months when he did nothing although during April building operations began. On the 31st July he complained that the matter had never been advertised nor his views sought. It was at this time that the question of the legality of what was being done was raised by him for the first time. I cannot see that there have been any laches by him since 31st July bearing in mind that he was entitled to presume that what was being done by the Council was being properly done. The point is whether he should not be allowed to seek his remedy now because he delayed so long in going to a solicitor. Looking at his conduct as a whole and bearing in mind that he was dealing with a local authority which was presumably obeying the law, I cannot see that his delay from the start of building operations until the end of July was unreasonable. He has been trying since February to be heard by the Council and that has been refused. I therefore consider that there have not been such laches that he should be denied his remedy, if he has one.

If I have exercised my discretion in this matter improperly, I still consider that this is such a matter of public importance that it is a case in which the Court should exercise its discretion because, if what the Applicant alleges to be the law is in fact the law then the Ipoh Town Council is acting in a way which the law does not permit. This principle was applied by Lord Goddard · C.J., on an application for *certiorari* in the case of *Regina* v. *Brighton Borough Justices, Ex parte Jarvis*[2] where he said: "I think that this is eminently a case in which we should exercise our discretion because, if this state of affairs were allowed — we are told (there is no actual evidence about it) that it has

been tried on in other places — it would be an obvious way of getting round the provisions of the Licensing Act and justices would be acting in a way which, in our opinion, the law does not permit. It is, therefore, just as well that this question should be decided." With that opinion the other two judges agreed. I think the case before the Court now is of sufficient importance with regard to town planning generally to merit being heard.

The principal question which I have to decide is whether it is lawful for premises erected on the owner's land to be used as an inn and for "nocturnal entertainment". It is submitted by the applicant that such user would be contrary to the provisions of the Town Boards Enactment because user of the land is at present restricted to purely residential use only. It is therefore necessary to examine what restrictions, if any, are placed upon the development of the owner's land.

Part IX of the Enactment contains provision for town planning. Section 135 gives every Town Board the power to prepare a general town plan. It is common ground that this has been done for the Ipoh Town Council area and that Exhibit A. 10 is a copy of that plan. Section 136 sets out the contents of a general town plan. Its detail is important and I therefore reproduce it in full —

"136. (i) A general town plan (hereinafter referred to as a draft plan) may shew or make provision therein for —

(a) streets, railways and other main communications;

(b) zones or districts set apart for use for any type or category that may be stated on such draft plan of residential, commercial, industrial, agricultural or other use and zones or districts (being either the same as or distinct from any of those hereinbefore described) in any one of which the number of houses in any acre shall not exceed the number indicated by the draft plan as the number of houses per acre permitted for that particular zone or district;

(c) reserves for Government purposes;

(d) parks, recreation ground and similar open spaces;

(e) building lines; and

(f) regular lines of streets which have been declared under Part VII.

(ii) The draft plan may consist of one or more plans drawn to such scale and reproduced in such manner as the Board may determine."

Sections 137, 138 and 139 provide the mechanism for the advertisement of a draft town plan and its submission to the Ruler in Council. Section 140 provides for approval of the plan by the Ruler in Council. Section 140(v) provides that the draft plan shall be printed and a copy permanently exhibited for public inspection at the offices of the Board, and the fact of such approval and exhibition shall be notified in the Gazette. This was done in 1931 (See F.M.S. G.N. 2846/31). Since all parties appearing before the Court are agreed that Exhibit A. 1 is a copy of the approved plan, I therefore assume that everything that is required under section 140 of the Enactment has been done in respect of Town Plan Exhibit A. 1.

It will be seen from sub-section (i) of section 136 that a general town plan may contain a very great deal of detail as to the user of the various zones or districts. When one comes to look at the Ipoh Town Plan Exhibit A. 1 one finds that the provisions therein are very vague. At the foot of the plan there is a key to the various coloured zones which makes provision for the following —

Open Development.
Shop-house Area.
Terrace-dwelling Area.
Heavy Industrial Area.
Light Industrial Area.
Public Open Space.

It appears from this plan that the land in question is in a zone or district set apart for "open development".

Section 145(i) of the Enactment provides that "the Board shall refuse to approve the plan of any new building . . . . unless such plan is in conformity with the approved plan." If, therefore, the building for which plans have been approved is to be used for purposes other than that permitted in an area set aside for "open development" then the Ipoh Town Council has done something unlawful.

There is in general use in the Town Council offices in connection with the approved plan another document which is referred to as the "key to zoning". Exhibit A. 2 is a copy. It is common ground that this key has not been gazetted as forming part of the Ipoh town plan. The history of the key is as follows. It was found that the existing town plan was too small to use for practical purposes, and a re-drawing of it was made on a larger scale changing the colour of the zones but preserving the existing zones. It did in fact add one other zone which it called "Repair Shop Area". Whether this has been placed in the industrial area or shop-house area I do not know and am not concerned with here. This key was not gazetted because it was considered to conform with the existing town plan and purported to give effect to the existing practice of the Town Council in applying town planning provisions. It appears to me that the key to zoning Exhibit A. 2 has no statutory value of any kind whatsoever. Its importance is that it does indicate what was in fact the practice of the Town Council. Whether that practice was in accordance with the written law is another matter altogether. So far as the practice in the key to zoning (Exhibit A. 2) is concerned, in an 'open development' zone, which is normally confined to detached and semi-detached houses (A. 1), the erection of a first class hotel (B. 2) and a first class restaurant (D. 8) is permissible if the permission of the Town Council has been obtained in the manner provided by the footnote to the key to zoning, Exhibit A. 2.

According to the key in an 'open development' zone a bar café (D. 4), a cinema or dance hall

(H. 1) or a cabaret (I. 1) can never be permitted.

It has been submitted by the respondents and the owner that since the key to zoning Exhibit A. 2 has no legislative force the approval for the erection of a first class hotel can be given by the Town Council in any manner and need not comply with the footnote. The argument of the respondents and the owner goes further than this. It extends to include power for the Town Council to approve the use of the land for the purposes desired by the owner. It is their argument that the expression "open development" includes the general development of an area with certain social amenities.

It is common ground with all the parties before the Court that the expression "open development" is a technical term and can best be explained by experts. Mr. Aitken, the State Planning Officer, Perak, gave as his opinion that the expression "open development" is an expression used by town planners in zoning, and it is used throughout the former Federated Malay States. It has no legal definition and has come to mean in the former F.M.S. detached and semi-detached houses as distinct from terrace houses. The definition as understood by town planners is that it can be used for private residential purposes. The attention of the Court was also drawn by Mr. Lewis to a paper (Exhibit R. 5) by Mr. Fairbank a town planner in the Federal Town Planner's Office. In that paper he says:

> "The residential areas of Ipoh (and all other towns for that matter) are being planned on the neighbourhood principle. A large neighbourhood of say 15,000 people might eventually support a clinic, a library or reading room and possibly a cinema. It is obvious that a neighbourhood or a group of neighbourhoods on the perimeter of a town would be more self sufficient than those next door to the town centre itself.
>
> Plan 2513 — (Exhibit A. 2) — enables provision to be made for neighbourhood and district centres as and when development occurs without recourse to the old legal change of zoning procedure. It permits a useful and flexible interpretation of the original zoning reference. Protection is afforded to Third Parties as outlined in the Footnote to the Schedule on Plan 2513."

Mr. Fairbank's paper written in 1955 appears to me to be describing what he considers should be permitted in an Open Development area. He says that the "residential areas of Ipoh . . . . . are being planned on a neighbourhood principle". He then goes on to describe that principle. It seems to me he is describing something which is a new conception and not a conception which was in the mind of the town planner and approving authority of 1931. Mr. Fairbank then went on to express his personal opinion that the key Exhibit A. 2 permitted certain aspects of the neighbourhood principle to be put into force without re-zoning. I have not had the benefit of hearing Mr. Fairbank but no objection has been taken to my considering his report.

When the proposal for the inn was referred to the Federal Town Planning Department the Council were informed "that there are no town planning objections in principle to the proposed development. A use such as is proposed is undoubtedly needed in Ipoh, and it is thought that a similar example is the 'Griffin' in Ampang Road, Kuala Lumpur." That appears to me to mean that in the Federal Town Planner's opinion the carrying on of a business such as is proposed at the Olympic Inn is not contrary to modern ideas of town planning in an open development area.

I am concerned with what was intended by the words, "open development," when they were first used in connection with this plan in 1931. Mr. Aitken has given as his opinion that the business of a first class hotel cannot be carried on in an open development area in the former F.M.S. without amendment of the plan by way of re-zoning. This certainly appears to have been the opinion of the Council in May, 1955, when they refused re-development of the corner site at the junction of Tambun and Gopeng Roads as a boarding-house. (See Exhibit A. 3).

The intention of the approving authority when the town plan was approved in 1931 can to some extent be deduced not only from considering the opinion of experts but also from the wording of the reference on the plan itself and what has happened in practice. Section 136 of the Enactment refers to zones or districts for residential, commercial, industrial, agricultural or other use. It is to be noted that no zone or district is referred to in the town plan as residential. The shop-house area is clearly a mixed commercial and residential area. The terrace-dwelling area to my mind is residential only. It is to be noted that the heart of the town is general shop-house area. It is surrounded by a terrace-dwelling area. Outside these two central shop-house and terrace-dwelling areas are the areas of open development and of heavy industry and light industry. The deduction which I draw from this is that the original planners intended that the heart of the town should be commercial, that it should be immediately surrounded by a residential area in which the buildings could be of the terrace-type but outside this there should be an area for the better class of residences and areas for light and heavy industry, and I deduce from this that the area for open development was intended for purely residential non-commercial purposes only. Having deduced this from the plan I then consider it against the manner in which Ipoh has in fact developed, and I find that it has developed in that way. There has certainly not been pointed out to me a first class hotel with or without dancing facilities in an open development area. There has been pointed out a school nearly opposite the land in question. Whether or not the area was re-zoned in respect of that particular school I do not know. It is common ground that it is at present a private school. I note also that the Council has previously refused an application for a boarding-house licence in an open development area.

Apparently the key Ex A. 2 was intended to reflect the existing practice. Looking at the key as a whole and at the footnote in particular it appears to me that the Federal Town Planner who drew up the key was attempting in the footnote to carry out the main provisions of section 144 of the Enactment. Whether that would have been a sufficient procedure to comply with the Enactment does not arise since the key was never gazetted. It is interesting to note that when this key was approved it and Plan 2513 appear to have been sent to the Ruler in Council for approval but this was considered by the State Government to be unnecessary since it was considered that the key and the new plan merely clarified what already existed. In my opinion the Town Council were completely right and that the new town plan should have been approved and gazetted after the whole procedure which the law required had taken place. (See Exhibit R. 8).

I am satisfied that in the district or zone of open development in the Ipoh Town Council area it is permissible to erect detached or semi-detached private residential premises and that if any other type of user is required in that area an amendment of the approved plan in part in accordance with the procedure laid down under section 144 is necessary. Having considered the expert evidence, the wording of the plan and the development which has in fact taken place, I find the words, 'open development', mean for detached or semi-detached private residences only'. I am satisfied that user for commercial purposes — e.g. hotel, dance hall, cabaret, eating-shop, commercial advertising — in an 'open development' zone is unlawful and that exemptions can only be made after following the procedure laid down by section 144 of the Enactment.

I turn now to the interesting argument advanced by Mr. Arulanandom. The remedy sought is that the Council "be prohibited from hearing or determining any application for a licence by any person in respect of the premises . . . . under regulation 11 of Part VIII of the Bye-Laws under the Town Boards Enactment or for exemption of the said premises from the requirement of a licence under regulation 13".

I pause to note once more that I am not asked to deal with any licence under the Boarding Houses Enactment (Cap. 87) and my final order is not intended to affect directly the grant of any licence thereunder.

It is argued by the owner that the entertainment to be offered to the public at the proposed inn is not such as to bring it within the control of regulations 10 - 13 of the Bye-Laws relating to the control of theatres and other places of public resort.

The general subheading controlling these regulations is as follows: C — The regulation of certain places of public resort. The relevant regulations read as follows —

10. " Places of public resort " includes any land, building, garden or enclosed space where any entertainment or amusement is carried on and to which the public or any class thereof may have access on payment of an admission fee, or where the public are invited to take part in such entertainment or amusement on payment of a fee.

11. No person shall open or keep any such place of public resort unless he holds a licence issued by the Chairman for that purpose. Application for such licences can be made at any time, but the period of the licence, when issued, shall be such that it will expire half yearly, namely, 30th June and 31st December of the year of issue.

*13. The Chairman may exempt from the provisions of by-law 11 of this part any premises licensed under the Theatres Enactment or the Places of Public Amusement Enactment which are not situated within an enclosure to which the public have access on payment of an admission fee; or in which the public are invited to take part in any entertainment or amusement on payment of a fee.

(ii) No building, booth or stall situated within any such enclosure used as a theatre, place of public amusement, eating-house, coffee-shop or place for the storage or sale of fresh provisions shall be exempted from the provisions of the Theatres Enactment, the Places of Public Amusement Enactment, the Town Boards Enactment or any rules or by-laws thereunder by reason of the fact that a licence under by-law 11 of this part has been issued in respect of such enclosure.

"Place of public resort" is nowhere defined in the Enactment. The *ejusdem generis* rule is some assistance in finding its meaning when we consider section 15(i)(c)(vii) of the Enactment which reads —

"The powers in this Enactment conferred upon a Town Board or upon a Chairman may be exercised for the following purposes:

(c) the control and supervision by registration, licensing or otherwise, including in proper cases the prohibition, of

(vii) common lodging-houses, eating-houses, coffee shops, jinrikisha depots and premises where jinrikisha-pullers reside, theatres, native inns and other places of public resort."

Reading this section with section 2 of the Boarding Houses Enactment (Cap. 87) the expression "common lodging-house" does not include "boarding house" because this section excludes "common lodging-house from the interpretation of "boarding house". Since the Boarding Houses Enactment provides for the licensing of boarding houses it would seem that there was no intention to include their licensing within the scope of section 15(i)(c) of the Town Boards Enactment.

All these places mentioned in section 15(i)(c)(vii) are buildings to which the public have access not being publicly owned buildings and not being boarding houses. That I take to be the definition of "place of public resort" for the purposes of Part VIII of the Bye-Laws.

The first point to be noted is that it is only certain places of public resort which are to be regulated. Regulation 10 defines some places of public resort and, as Mr. Das has pointed out, this regulation does not purport to be exhaustive since it states what is included in the expression

* By-law 13 has been amended in so far as it relates to Seremban (G.N. 1032/40) and Tampin (G.N. 3919/40).

"places of public resort". However, when we come to regulation 11 we note that a licence is required for "any such place of public resort". It appears to me that grammatically "any such place of public resort" can only refer to the particular places of public resort which are mentioned in regulation 10 as being included in the definition and therefore the "certain places of public resort" which are regulated are those "where any entertainment or amusement is carried on and to which the public or any class thereof may have access on payment of an admission fee or where the public are invited to take part in such entertainment or amusement on payment of a fee". It appears to me therefore that these regulations only apply to places of public resort to which access is had or participation in the entertainment thereat is permitted on payment of a fee.

It has been argued that there is nothing in this case to indicate that a fee will be charged for admission to or participation in any entertainment to be carried on at the proposed inn. The general application has been for approval of "nocturnal entertainment" on the premises (See Exhibit D. 7 folios 1 and 4). From the original application it is not clear whether or not a fee will be charged. It is perfectly clear however that if a fee is charged for admission to "nocturnal entertainment" on the premises then a licence will be necessary, even though there may be no fee provided for the licence. Since it is perfectly clear that if a fee is charged a commercial enterprise will be carried on upon these premises and it will be contrary to the Town Planning provisions of the Town Boards Enactment it necessarily follows that the Town Council should not consider licensing or exempting these premises from any licence under Part VIII of the Bye-Laws. I therefore consider that the application should be granted.

I am not saying whether or not a first class hotel open generally to the public at which dancing takes place is to be licensed under any other provision of law. I am here concerned only with regulations under Part VIII of the Bye-Laws under the Town Boards Enactment and not with the provisions of any other written law. I hold that if an admission fee is to be charged to the entertainment the place is such a place of public resort as is subject to regulation under Part VIII. If no fee is to be charged it is not such a place and no licence under regulation 10 is necessary. In that case, the owner will not be adversely affected by an order of prohibition as prayed. I am not saying that the carrying on of a first class hotel with dancing will be lawful if no admission fee is charged. All I say is it will not be caught by Part VIII of the Bye-Laws under the Town Boards Enactment, which is all I am concerned with today. What is "an admission fee" or "payment of a fee" will depend, of course, on the facts of each particular case.

Order as prayed.

I will now hear any argument as to costs.

Application granted.

Solicitors: *N. Sharma; Gibb & Co.; Braddell & Ramani.*

PUBLIC PROSECUTOR v. FATIMAH

[A. Cr. J. (Hepworth J.) January 14, 1960]

[Kota Bharu — Criminal Appeal No. 42 of 1959]

Customs Ordinance, 1952, ss.115 and 131(2) — Knowingly being in possession of uncustomed goods — Burden of proof on accused — Rebuttal of presumption of knowledge.

The respondent was stopped by a Customs Officer when walking past the Customs Shed at Rantau Panjang Railway Station, Kelantan. She was asked if she had anything to declare and replied that she had only some old clothings. After searching the bags she was carrying the Customs Officer found apart from old clothings a number of dutiable articles. The respondent did not give a reasonable explanation of the presence of these articles or produce any receipts. She was accordingly charged with knowingly being in possession of uncustomed goods contrary to section 131(1)(d) of the Customs Ordinance, 1952. At the conclusion of the prosecution case the respondent was acquitted and discharged without being called for her defence. The Public Prosecutor appealed.

Held: what the prosecution had to prove was simply that the respondent was in possession of dutiable goods at the time and place alleged in the charge. The effect of section 115 of the Ordinance is that if a customs officer finds a person in possession of dutiable goods anywhere in the Federation he can take him to court and make him prove that the duty has been paid, or make him rebut the presumption of knowledge which is created by section 131(2). In the latter case the person charged must prove to the satisfaction of the Court that he does not know that the duty has not been paid. Appeal allowed.

Cases referred to:—

(1) *Public Prosecutor* v. *Tay Yew Lia* [1957] M.L.J. 17.

(2) *Yap Yoon Lin* v. *R.* [1954] M.L.J. 59.

MAGISTRATE'S CRIMINAL APPEAL.

Syed Hamzah (Deputy Public Prosecutor) for the appellant.

Wan Mustapha bin Haji Ali for the respondent.

Hepworth J.: In this case the respondent was charged with knowingly being in possession of uncustomed goods contrary to section 131(1)(d) of the Customs Ordinance 1952. At the conclusion of the prosecution case the respondent was acquitted and discharged without being called upon for her defence. From this decision the Public Prosecutor appealed.

The brief facts of the case were that the respondent was stopped by a Customs Officer when walking past the Customs Shed at Rantau